SUPREME COURT, U. S.

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No. 882.

IN THE

Supreme Court of the United States

October Term, 1966.

WALTER C. WRIGHT, JR.,
Petitioner,

v.

PRESS PUBLISHING COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

JURISDICTION.

Respondents deny that there is jurisdiction under 28 U.S.C.A. Sec. 1257, in that alleged constitutional issues were neither presented to the trial court, nor to the Appellate Division, and Petitioner conceded at least that they were "temporarily" abandoned in the Appellate Division (p. 7:1). The Statement of the Questions Involved that he presented to the Supreme Court of New Jersey were different than those that he presented to the Appellate Division, so that it is a fictitious appeal—different than the one he took from the Law Division to the Appellate Division.

He sought advisory opinion before Supreme Court of New Jersey.

AS TO STATEMENT OF QUESTIONS INVOLVED.

The "Statement of Questions Involved" in petition (pp. 2 & 3) are entirely different from those stated in his Brief on Appeal to the Appellate Division in New Jersey. As brief not filed here, it was as follows:

"1. Was verdict against weight of evidence?

Did Court Err In:

"2. Dismissing complaint?

"3. Excluding evidence of initial hostility?

"4. Striking testimony of notice to defendant of unfair news reporting?

"5. Excluding carbon copies of letters which put editor on notice?

"6. Excluding prior and subsequent publications?

"7. Excluding evidence of defendants' treatment of real news blackouts?

"8. Excluding certain evidence of malice?

"9. Excluding evidence of political motivation?

"10. Striking an interrogatory concerning defendants' failure to investigate?

"11. Striking interrogatories concerning City Manager's denial of news blackout?

"12. Striking interrogatories concerning plaintiff's denial of news blackout?

"13. Striking certain requests for admission?

"14. Refusing to strike Fifth Defense until after certain evidence?

"15. Refusing to dismiss First Count of complaint in case consolidated with present case, until after verdicts had been returned?

"16. Charging jury as to meaning of 'malice'?

"17. Refusing Requests to Charge indicated in Motion for New Trial?

"18. Excluding certain evidence of diminution of earnings?

"19. Excluding evidence of election returns?"

It will be noted that it did not contain the questions raised here and no Federal question. Questions must have been raised below, otherwise not open in proceeding on petition for certiorari so as to give this court jurisdiction. *Rule 23, 1(f); Ellis v. Dixon,* N. Y. 1955, 75 S. Ct. 850, 349 U. S. 458, 37, 350 U. S. 855, 100 L. Ed. 759."

Respondents submitted Counterstatement of Questions, not filed here by Petitioner either, as follows:

"1. In an action for libel, by a public official against a newspaper and its staff, based upon criticism of plaintiff's admitted action as Mayor in cutting off public news, where there was no evidence of known falsity or

recklessness of factual statements published so as to constitute 'actual malice', and jury found no malice and no causes of action, and trial judge dismissed action, was there error?

"2. Were the words complained of libelous?

"3. Were the words complained of true?

"4. Did the words complained of constitute, in any event, Fair Comment?

"5. Did the words complained of also constitute privileged communications and on privileged occasions?

"6. Were the words complained of, not libelous *per se,* and did plaintiff sustain or allege special damages?

"7. Did the words complained of, if defamatory and if published with 'actual malice', reflect on the plaintiff as a public official—councilman and mayor—on the other councilmen and the community and/or city, and/or did the plaintiff seek recovery of damages for the benefit of the city, and does such an action lie?

"8. Did the Court err in the respects pointed out in plaintiff's statement of questions involved?"

These are the questions on which the appeal was submitted, argued and decided by the Appellate Division.

In New Jersey, "Statements of Questions Involved" on appeals are contained in briefs and constitute and limit questions considered by the Appellate Courts. (Rules Governing The New Jersey Courts, *Rule 1:7(c)).*

Petitioner disregarded his Statement of Questions in his Petition for Certification to the Supreme Court of New Jersey and set forth a new Statement of Questions. Oddly, he did not file this important paper either, to show jurisdiction under *Rule 23, 1(f).*

And when certification was denied, petitioner proceeded

with appeal and sought a double review by Supreme Court of New Jersey by an alleged constitutional issue which was neither presented to the Trial Court, nor to the Appellate Division, and which he expressly abandoned, even though he said "temporarily" in the Appellate Division, and which did not constitute a "substantial constitutional issue" at all.

And, in his brief thereon, he changed "Statement of Questions Involved" again. Supreme Court dismissed this appeal.

Oddly again, he did not file the new statement here, although important to show compliance with *Rule 23, 1(f).*

And before your Honorable Court, petitioner states questions that are different than those before the Supreme Court of New Jersey.

STATEMENT OF THE CASE.

The statement of petitioner is so inadequate and distorted that it is necessary for respondents to restate case.

May we refer to the petitioner as the plaintiff?

Plaintiff is a lawyer and was the Mayor of the City of Cape May when the articles sued on, were published, and he instituted this action for libel on July 24, 1961.

Defendants-Respondents are PRESS PUBLISHING COMPANY, STANLEY FINK, WILLIAM McMAHON, WILLIAM H. THOMPSON, and MICHAEL COMERFORD, who were the owner, editor, state editor, bureau chief and reporter respectively, of the *"ATLANTIC CITY PRESS"*.

Judgment in favor of defendants and against plaintiff based upon jury verdict and special findings, was entered on April 2, 1964, there were intermediate appeals on various aspects of action at every stage of these long drawn out proceedings.

There was appeal therefrom by plaintiff to the Appellate Division on May 18, 1964.

The appeal was by plaintiff from judgment of no causes of action on 4 counts of his Amended Complaint, upon special findings of jury (1) that the publications were not libelous, (2) that defendants established the defense of truth, (3) that the defendants were not guilty of 'actual malice' and (4) that the defendants established the defense of Fair Comment; and from judgment of dismissal of the complaint and action by the Court after the return of the jury.

Also appeal from order denying plaintiff's motion to set aside verdict of jury and for new trial.

The underlying facts were substantially undisputed.

There was substantially no dispute or question of fact, of what the plaintiff said to the newspaper reporter, Michael F. Comerford, defendant, about the so-called "blackout" of news of the city and what the defendants published.

The subject of the 4 counts of the Amended Complaint alleged to be false by the plaintiff, were summarized in the headline, sub-headline and the first paragraph of the article in the Cape May County edition of the Atlantic City Press of February 1, 1961 (Ex. P-1, Vol. 11 P 152a), as follows:

> "WRIGHT ORDERS BLACKOUT OF CAPE MAY NEWS.
>
> "Gag Action Follows Displeasure with Criticism of Sales Tax.
>
> "Cape May—A news blackout has been put into effect in this city until 'an orderly and efficient means can be worked out to disperse press releases to newspapers', Mayor Walter Wright announced Tuesday."

In essence, the alleged libel resided in the term "blackout" and that plaintiff ordered it, based upon the underlying facts which were admitted substantially.

The articles only referred to the plaintiff as a public official, namely, a councilman and Mayor: there was no reference to him otherwise.

Defendants take issue with plaintiff's statement that he was "constantly harassed by newspapermen, particularly the defendants" (Pp. 2:10). There was no such proof. What prompted plaintiff in refusing to give reporter Comerford information, appears in the admitted telephone conversation, as follows:

> "Comerford, 'Hello, Mr. Wright. This is Michael Comerford of the Atlantic City Press.' Wright, 'Before you say anything I want to tell you that I am not going to say anything concerning the city. We have been receiving some bad publicity lately and the councilmen and I have decided not to say anything until we work out some efficient and orderly means to disperse press releases. I guess you saw what happened in the Philadelphia Bulletin Sunday.'"

The refusal was reiterated in the rest of the conversation (P IV Tr 223-227).

It is to be noted that the bad publicity was not in defendants' newspaper, but in the Philadelphia Bulletin.

It was conceded from the outset "that the telephone conversation between plaintiff and the reporter formed the sole basis of the blackout story". (Admitted by plaintiff, Pp 3:14.)

The 2d publication was about a poll taken of the Mayor's refusal to give out news concerning the City (P 11 153a, Ex. P-2). Plaintiff's opposition thereto was principally to the term "news blackout" (P IV Tr 299-237).

The 3d publication was editorial based upon the "news blackout" story (P II 154a, Ex. P-3).

The 4th and last publication appeared in a Sunday col-

umn, *"What Happened in our Town"*, which summarized the previous articles (P II 155a, Ex. P-4).

The basic issue between plaintiff and defendants was whether his action constituted a "news blackout" of municipal affairs of Cape May City.

This situation was in effect during the publication of said articles, so far as the plaintiff was concerned (P IV Tr 186:19-21).

Plaintiff testified that his definition of "blackout" in these circumstances, in the case of a withholding of news, would be a "cutting off" (P IV Tr 187:1, 11).

He also testified that in the context of the story that "gag action" and "blackout" were synonymous terms (P IV Tr 190: 19-22).

Plaintiff conceded that it could be held that defendants proved a "dim-out", but that this was short of a "blackout", because *Webster* defined "blackout" as "total darkness" (Psb 11:23), and, as to it being "something of a temporary character, not necessarily. Could last for a year. There is no necessity to be temporary" (P IV Tr 187:22).

REASONS FOR DENIAL OF WRIT OF CERTIORARI.

(1) Plaintiff's Statement of the Questions Involved are different than those presented to Appellate Courts of New Jersey.

(2) Constitutional issues were neither presented to the trial court, nor to the Appellate Division of New Jersey. In fact, plaintiff states that they were "temporarily abandoned in the Appellate Division".

(3) The doctrine of New York Times Co. as to "actual

malice", appears clear and does not appear to require further guidelines; and, it is submitted that it was not a Constitutional issue.

(4) Plaintiff raised academic questions of privilege in self-reporting by newspaper of judicial proceeding involving it and malice, which are without support in record of trial court or of Appellate Division, and which involved no judicial action in said courts, and sought advisory opinion.

ARGUMENT.

The Petition for Writ of Certiorari should be denied, because—

(1) It presents a case to your Honors that is different in substantial and important respects if not wholly, from the case presented to the Appellate Courts of New Jersey.

(2) The alleged Constitutional issues were neither presented to the trial court, nor to the Appellate Division, and plaintiff conceded at least that they were "temporarily abandoned in the Appellate Division" (Pp 7:1).

Plaintiff did not attempt at the trial or before the Appellate Division to prove that he was denied a trial and fair trial under the State and Federal Constitutions. He did not attempt to do so in his motion for a new trial (Pp 10:15).

Plaintiff has misstated that he sought to introduce as exhibits on appeal, which he claimed prejudiced his said rights (Pp 11:6): he never raised the point formally or during trial, and the Appellate Division denied his motion which was merely for permission to print exhibits even

though they were not offered at the trial without stating any legal reason or ground (appdx on Petition for Certification, P 26a, 36a).

And he did not offer said exhibits on his motion for new trial. (See particularly (*Id.*, 39a:36 to 40a:7).) The Appellate Division denied the motion (*Id.*, 56a), and the Supreme Court of New Jersey, on Motion for Leave to Appeal therefrom, denied same on January 7, 1965 (*Id.*, 59a:25).

In a *"Note"* in his Petition to the said Supreme Court (Pp 14), plaintiff referred to the rule of "actual malice" as defined by this Honorable Court in *New York Times Co. v. Sullivan,* 376 US 254, 84 S. Ct. 710, 11, L ed 2d 686, 95 ALR 2d 1412 (1964), and stated that the last 6 Points (3 to 8) were concerned with the proper interpretation of the Rule or kinds of evidence admissible to show malice (14:20).

Plaintiff stated that the first 2 points involved "purely constitutional questions" which he contended to be appealable, i.e., whether newsmen have privilege to publish day by day accounts of court trials in which they are engaged (4:21).

Then for the first time and before the Supreme Court of New Jersey, he offered "9 exhibits to show that a fair trial is virtually impossible when the defendant newspaper publishes its version of the daily proceedings" (5:3-5).

First: May it be noted that the trial took 19 days, from February 13th to March 24, 1964. There were 19 or 20 articles and plaintiff offered 9, so it is fair to infer that the other 10 or 11 were unobjectionable. The 9 articles offered were published during the first half of the trial period. Plaintiff has never pointed out anything objectionable in said 9 articles.

At the argument of plaintiff's motion for a new trial, April 10, 1964, Judge Francis, trial Judge, said (P 53a:10

to 54a:9), that plaintiff cited no grounds; only 2 issues of the newspaper were called to his attention; that on the first day when jury was selected plaintiff complained about February 14, 1964 article entitled "JURY PICKED FOR CAPE LIBEL TRIAL", (id 5a), because defendants made it appear that freedom of press was at stake, while plaintiff's attorney objected because the article reported that consolidation of the 2 cases for trial had been agreed when it had not (id, 41a:28-36); and

that "Mr. Wright's counsel attempted to prevail upon Mr. Wright that there was nothing in the article which was in any way detrimental * * * found something wrong with the idea that the consolidation had been consentual rather than by order, to which Mr. Wright replied, and I think properly, that this was trivial, so that we even had disagreement between Mr. Wright and his counsel as to whether or not there was anything improper in that first issue. I did not read the issues during the trial" (id, 53a: 27-37).

Plaintiff said that "the case was not concerned with freedom of the press, but rather with the question of whether freedom of the press had been abused. * * * that it was prejudicial for the defendants to make it look like freedom of the press was involved, when there was merely a suit for libel. * * *. The Court could see nothing prejudicial about this article nor the article we showed the Court the next day, which quoted a great deal from the openings to the Jury" (id, 39a:14-25).

The affidavits of plaintiff and his attorney were never submitted to the trial court, and were presented for the first time with the notice of motion to the Appellate Division for permission merely to print the articles in the Appendix.

It seems that they were straining at gnats, while swallowing camels, because the opening paragraph of the article

was justified by our questioning of each prospective juror "if he or she believed in Freedom of the Press in general. Each replied in the affirmative" (id, 5-25); and

as to the alleged unfairness of the February 19, 1964 article, entitled "DUAL LIBEL SUIT BEGINS AT CAPE" (id, 7a), because "the article destroyed the strength of my (plaintiff's attorney) opening to the jury and gave Mr. Harry Green's opening such forceful presentation that I felt it could not help to have an effect on the jury" (id, 42a-8).

Said article contained copious quotes from both attorneys and embraced what both counsel said in open court to the jury, and wholly within the record of this case.

Plaintiff has not pointed out a single thing therein which was not said by counsel in open court at the time before the Court and jury, and as stated in the article. If it was otherwise, it is suggested that plaintiff would have transcribed the openings and incorporated in the record.

Absolutely nothing is shown in the other 6 articles of an unfair or inaccurate character, and he has not asked to include other 9 or 10 articles of the trial series.

Attention is called to Mr. Arkus' affidavit on the same motion as to care that the Press used in assigning an experienced reporter from another county, the Courthouse at Mays Landing, Atlantic County, to cover the trial in Cape May County Courthouse and to report only what transpired in open court (P 31a:19-31).

As for the first 2 Points, which plaintiff said "involve constitutional questions," (4:21) ——

He sought under Point I, "certification so that he will have the opportunity to prove that he was denied a trial by jury * * * and also a fair trial" (10:11-20).

First, he had the opportunities in the trial court and before the Appellate Division, but did not see fit to do so.

On the merits, he has not pointed out anything in his

Petition showing anything inaccurate or unfair. His petition is completely silent on same.

It is submitted that a newspaper has the right to publish the report of a judicial proceeding, and it is qualifiedly privileged if the report was full, fair and accurate, "although the report contains matters that would otherwise be defamatory and actionable, and no action will lie therefor except on proof of malice in making it." (*Rogers v. Courier Post Co.*, 2 N. J. 393, 402 (1949).)

Petitioner talks about a denial of a "fair trial" in the abstract and in a vacuum.

What petitioner complains of, is that the newspaper published reports of the trial, to which it was a party.

First, may it be reiterated that he did not raise the issue at the trial or before the Appellate Division.

At the motion for a new trial, plaintiff stated "this question had never been presented before, and actually it is the question I am the most interested in, * * *, from not only my own standpoint but from an academic standpoint." (Vol. I, App. Div., P 118a:5-9).

He then delivered a rambling dissertation that human nature precludes impartiality by a newspaper about itself (id., 9-29), and "I don't think that the newspaper should be permitted to print the story of what happened at the trial" (id., 29-32).

"I know there is no rule that applies so far as newspapers are concerned, but I think there should be a rule of law established along that line and I don't think it would take legislation to do so. I think the Supreme Court could establish such a rule" (id., 36-40).

PETITIONER SEEKS ADVISORY OPINION.

It is submitted that what the plaintiff seeks is the use of this case as a vehicle for an advisory opinion on this proposition of law, even though it prolongs this already old litigation. Your Honorable Court has said that it is without power to give advisory opinions, and its practice is not to decide abstract hypothetical, or contingent questions. *Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory,* Ala. 1945, 65 S. Ct. 1384, 325 U. S. 472, 89 L. Ed. 1725.

And petitioner gives no consideration to the 1st Amendment of the Federal Constitution, or to the rule of privilege in reporting a judicial proceeding, even if newspaper is a party, and simply states it as an *ipse dixit.*

Petitioner cited in support, *Estes v. Texas,* 381 U. S. 532, 85 S. Ct. 1628 (1965). There is no comparison. It is submitted that *Estes* was decided wholly on the injection of the trial judge permitting the trial to be telecast against Estes' objections after a formal hearing thereon before the trial. Your Honorable Court scored the telecasting of the trial and the intensity of the publicity on Estes, and that it inherently prevented a sober search for the truth; that during the trial even the judge was harassed by the television operations and conditions became so bad, and upon further objections by defense counsel, the judge ordered that defense counsel and their argument should not be televised which made the trial so confusing to the jury, the participants and viewers by the changing day-to-day orders of the judge, that this resulted in presentation of only the State's side of the case, to the further prejudice of the defendant Estes' conviction was reversed because of the effect of telecasting upon the fairness of criminal trials.

There was a much later case by your Honorable Court dealing with newspaper trial publicity, decided 1 year after *Estes*—only seven months ago, which we thought that plaintiff would also cite—*Sheppard v. Maxwell*, 384 U. S. 333, 16 L ed 2d 600, 86 S. Ct. 1507, 34 Law Week 4451, decided June 6, 1966. Justice Clark wrote for the majority and said that the publicity from all media created a Roman Holiday throughout the pendency of the case with the greatest excesses committed by them without any control by the trial judge. Because of such publicity of the most prejudicial kind, defendant made motions for change of venue, continuance and mistrial, but they were denied.

No such motions were made by plaintiff during trial.

Justice Clark's opinion carefully pointed out the position and role of the press in these situations. They also touch upon the constitutional field plaintiff seeks to encroach and for the first time on appeal. However, plaintiff omitted any reference thereto.

The Court said:

> "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' *In re Oliver*, 333 U. S. 257, 268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '*(w)hat transpires in the court room is public property.*' *Craig v. Harney*, 331 U. S. 367, 374

(1947). The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.' *Bridges v. California*, 314 U. S. 252, 265 (1941). And *where* there was *'no threat or menace to the integrity of the trial,' Craig v. Harney, supra*, at 377, *we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism."*

* * * * * * * *

"'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.'"

" * * there is nothing that proscribes the press from reporting events that transpire in the courtroom."* (Emphasis added.)

The Court referred to certain excesses that occurred at the *Sheppard* trial, some as follows:

"* * * bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."

* * * * * * * *

"Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein."

"Much of the material printed or broadcast during the trial was *never heard from the witness* stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty * * *."

* * * * * * * *

"Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that 'misrepresented entirely the testi-

mony' in the case. Under such circumstances, the judge *should have at least warned the newspapers to check the accuracy of their accounts."*

None of these things occurred at bar.

In his affidavit on motion before the Appellate Division, he said (P 39a, on Certification, 23-29):

"The Court could see nothing prejudicial about this article (referring to freedom of the press) nor the article we (he and his attorney) showed the Court the next day, which quoted a great deal from the openings to the Jury. *The Court did caution the attorneys for defendants to look the articles over before they were published to prevent them from being too extreme."*

Undersigned counsel did look them over. Harry Green, of counsel, did so, and made answering affidavit as follows (Id. 54a:12-25):

"We made no suggestions to the newspaper reporter assigned to report the trial and the first we would know about it would be when we read the articles in the newspaper on the following day. *They appeared to be completely objective and factual reports of the trial to us, the Court and outside of 1 or 2 criticisms, to counsel who tried the case for Mr. Wright.*

"Mr. Wright concedes that the *exhibits* which he seeks to add were *not offered* either at the time of trial or on the Motion for a new trial, except as to the articles of February 14 and 19, 1964, which he suggests that he offered but 'no stenographic notes taken' thereof. *We deny any such offer."*

Plaintiff also sought to appeal as a matter of right the 6 last points which did not have constitutional questions on their face, but that constitutional question of extent of free-

dom of the press was implicit in same, because he felt that even though your Honorable Court in *New York Times Company* simplified the definition of malice, you laid down no guidelines "what kinds of evidence may be introduced" (Pp 5:22, 19:1).

He then proceeded to embrace the trial errors reviewed by the Appellate Division under this broad mantle of a constitutional issue (6:1).

He neither raised any constitutional issue in the trial court or before the Appellate Division, and without any factual record either in the trial court or in the Appellate Division to support same.

As to the trial errors, which do not appear in the Statement of Questions Involved in the Petition, but which were in the Statement before the Appellate Division, we treated same in our Briefs before the Appellate Division, and they did not involve Federal questions.

On the assertion of plaintiff, that your Honorable Court laid down no guide-lines "as to what kinds of evidence may be introduced to prove malice under the new definition" (Pp 5:23, 19:1), plaintiff's statement seems untenable.

The definition defines "actual malice" in 2 alternate parts, (1) knowing falsehood, or (2) reckless falsehood.

These categories have existed in this State for many years and cases have been tried thereunder.

(1) *Raymond v. Cregar*, 38 N. J. 472, 482 (1962); *State v. Browne*, 86 N. J. Super. 217 (App. Div. 1965); *Lawless v. Muller*, 99 N. J. L. 9, 11 (Sup. Ct. 1923), and numerous other cases.

(2) What is "reckless" has come up in numerous cases prior thereto.

Guidelines for both classes appear in the decisions of our

Appellate Courts, and it is suggested that the definition is not only "simplified", but its guidelines are, too.

Your Honorable Court did not define "reckless" in *New York Times*, but you did say that negligence in publication did not constitute "actual malice".

The Appellate Courts of this State (New Jersey) have dealt with "reckless" in analogous situations. Until our Supreme Court (N. J.) wiped out the distinction between "invitee" and "licensee" in personal injury case, it was necessary to establish in the latter that the defendant owed no duty except to abstain from acts wilfully injurious. *Faggioni v. Weiss*, 99 N. J. L. 157, 158 (EA-1923).

It is submitted that this is apposite to "reckless".

In *Rose v. Squires*, 101 N. J. L. 438 (SC-1925), the trial judge referred to willfulness as "that a thing is done recklessly with intent and without just cause or excuse." The Supreme Court (N. J.), in reversing, said (p. 440):

> "The necessary effect of this instruction seems to be that if the jury found Campbell guilty of gross negligence in driving, as it was claimed he did, they were at liberty to charge him with an act of willful injury if his passengers were hurt as a result of such negligence. But there is a substantial distinction between mere negligence, albeit gross, and willful injury."

Reversal aff'd., *sub nom Rose v. Campbell*, 102 N. J. L. 449 (EA-1926).

In *Staub v. Public Service Railway Co.*, 97 N. J. L. 297 (EA-1922), it was defined as follows (p. 300):

> "To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the in-

> jurious result. * * * There was therefore no evidence of willful or wanton injury which entitled the plaintiff to a submission of this question to the jury."

The term "reckless disregard" is used in the *Restatement, Torts (negligence),* p. 1291, Ch. 19, Secs. 500-503, N. J. Pocket Supplement, p. 294, which distinguishes it from negligence, even gross, and as the Justices, both affirming and dissenting, did in *Rose,* at pp. 451, 459, "there is a substantial difference between mere negligence, albeit gross, and willful injury."

> "Gross negligence is simply a degree of negligence, and remains within the realm of negligence."

In *King v. Patrylow,* 15 N. J. Super. 429 (AD-1951), author of the opinions in *New York Times, Garrison v. Louisiana and Rosenblatt v. Baer,* (Justice Brennan, then a member of the New Jersey Supreme Court), said (at p. 433):

> "The element of intent to harm the plaintiff is supplied, however, under the rule in effect in this State (other jurisdictions follow different principles, see *Restatement, Torts,* Scope Note, secs. 500-503 (1934) by a constructive intention as to the consequences, which, entering into the intentional act, which produces the injury, the law imputes to the actor regardless of whether or not he intended to harm the person, so that a charge which otherwise would be mere negligence, becomes, by reason of *reckless disregard* of the safety of the other, a willful wrong."

So that when Justice Brennan, in majority opinion, used the term in the monumental free press opinion in *New York Times,* it may be that he used it in the sense of a willful wrong as defined in the New Jersey cases.

In a dental malpractice case, citing *Rose* in support, the

Court said: (*Eatley v. Mayer*, 9 N. J. Msc. 918 (1931), aff'd., 10 N. J. Msc. 219 (SC-1932).

> "There is a distinction between gross negligence and willful and wanton disregard of the rights of others. Gross negligence does not support a charge for punitive damages, while a charge of willful and wanton disregard does support such a charge. The test is the intent with which the act is committed."

And the jury in the action at bar, in which certiorari is sought, expressly found no "actual malice" and so did the Trial Judge when he, after jury, decided reserved motion of defendants to dismiss the action because there was no evidence of "actual malice".

Moreover, there is a wealth of Libel and Slander law and literature on "actual malice" over the centuries in this State and Country and in England. For example, *Coleman v. Newark Morning Ledger Co.*, 29 N. J. 357, 373 (1959); *Gatley on Libel and Slander*, 5th ed.—1960, pp. 563-574, and *Odgers on Libel and Slander*, 6th ed.—1929, pp. 282, 560, and how to prove it, to name a few.

If anything, the U. S. Supreme Court simplified and reduced it to 2 concrete situations, and certainly established guidelines for same.

CONCLUSION.

It is submitted that the decision of the Supreme Court of New Jersey is correct. The New Jersey Courts from Trial level to the highest Appellate level gave this case the most careful consideration throughout the years when petitioner exhausted every avenue on every phase.

WHEREFORE, Defendants-Respondents respectfully pray that writ of ceritorari be denied.

Respectfully submitted,

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HARRY GREEN,
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Dated: January 13, 1967.